

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1228 OF 2003

Sau. Poonam Ankush Yadav

...Appellant

Vs.

Ankush Sadashiv Yadav

...Respondent

Mr.S.A.Sawant for the Appellant

Mr.R.S.Apte for the Respondent.

CORAM: ABHAY S.OKA, J.

LAST DATE OF HEARING: 14TH JULY 2004

DATE OF PRONOUNCEMENT OF JUDGMENT:AUGUST 9,2004.

JUDGMENT :

1. This Appeal arises out of a very unfortunate dispute as regards the custody of minor male child Shivam born on 20th May 1998 out of wedlock between the Appellant and the Respondent.

2. I have heard the Counsel appearing for the parties at length. I have also talked to the minor child in my chamber. I have also attempted to resolve the dispute amicably. However, amicable settlement does not appear to be possible and hence I am required to decide the Appeal on merits.

3. The Appellant and the Respondent married on 13th February 1997 and the son Shivam was born on 20th May 1998. The

Appellant filed an Application under Section 25 of Guardians and Wards Act, 1890 for custody of the minor son. The case of the Appellant is that there were number of incidents of assault on her by the Respondent. According to the Appellant, the Respondent demanded a sum of Rs.2 lakhs from her father. The case of the Appellant is that after various incidents of assaults, on 28th June 1999 the Respondent and his other family members dragged the Appellant to the terrace of their house and after kicking her they pushed her from the terrace as a result of which she fell down on the ground floor. As a result of the said fall, the Appellant suffered multiple fractures which required long hospitalisation and the medical treatment is continued till filing of the Application. As a result of injuries, the Appellant has become permanently disabled and it is stated that she is required to use a wheel chair. The case of the Appellant is that after she suffered the said injuries, she was not allowed by the Respondent and by her in-laws even to meet the child. The application for custody of the child was filed on 6th October 2000 when the child was only two and half years old.

4. The Application was contested by the Respondent by filing reply. The Respondent denied all the allegations made in the Application filed by the Appellant. The case of the Respondent is that when the Appellant had gone to the terrace on 28th June 1999, she accidentally fell down from the

terrace and sustained injuries. The case is that the Appellant has become disabled and lame and she is not in a position to look after the minor son Shivam.

5. The Appellant examined herself and narrated her case regarding assaults made by the Respondent and the incident of 28th June 1999. The case of the Appellant made out in the deposition is that her mother-in-law is likely to perform the second marriage of the Respondent. The Appellant stated that her mother-in-law was an aged woman and she was not in a position to look after the child properly. She stated that her mother and wives of her two brothers are ready and willing to look after the child. The Appellant was extensively cross examined by the Respondent. The Respondent also examined himself and was cross examined extensively. He stated that the Appellant has become handicapped and has to move on a wheel chair and is not in a position to look after the minor child as she herself is dependent on her family members. In the cross examination, a suggestion was given to him on the basis of marriage Invitation Card of one Santosh Yadav who is a relative of the Respondent that the Respondent has married to one Savita. However, the Respondent denied the correctness of the same. In the cross examination the Respondent was confronted with certain newspaper cuttings. The said newspaper cuttings contain a news report that the Respondent and others misbehaved in a temple after drinking liquor and a complaint has been filed against them.

6. The learned Trial Judge by his Judgment and Order dated 28th July 2003 dismissed the Application filed by the Appellant. One of the grounds on which the custody was refused was that the Appellant has become disabled and cannot look after the minor child and the Respondent was looking after the minor child practically since his birth and was in a position to spend on education of the minor child.

7. The learned Counsel Shri Sawant appearing for the Appellant relied upon an Additional Affidavit of the Appellant. The Appellant has annexed the copies of statements recorded by the Police while investigating the complaint made by the Appellant against the Respondent regarding alleged bigamous marriage performed by the Respondent. He submitted that the said statements show that one Savita is the second wife of the Respondent and she is residing in the house of the Respondent. In the said Affidavit, reliance is placed on the wedding card of one Santosh which was filed in the Trial Court in which the name of the said Savita was disclosed as wife of the Respondent. In the said additional Affidavit the reliance was placed on news items in newspaper cuttings which show that the Appellant misbehaved in a public place after consuming liquor. The learned Counsel for the Appellant submitted that considering the tender age of the child, the custody of the child has to be kept with the mother though she is

handicapped. He submitted that the Appellant's mother and her brothers' wives are in a position to look after the minor child. He submitted that though the Appellant may not be physically in a position to attend to the every need of the minor child, the child needed continuous company of the mother. He submitted that the Respondent has remarried and the said fact is suppressed by him. He stated that with a view to overcome the evidence to show that the name of his second wife Savita is printed in the marriage invitation card of one Santosh, the Respondent has now got published in the local newspaper a public notice in the name of Gulab Yadav i.e. the father of the said Santosh stating therein that there is a printing mistake in the invitation card. The said notice was published on 23rd April, 2004 which is clearly an afterthought. He submitted that the Respondent frequently consumes liquor and as reflected from the newspaper reports is misbehaving in public places while under the influence of the liquor. He submitted that considering the remarriage of the Respondent, considering the conduct of the Respondent and considering the fact that he misbehaves after taking liquor, the welfare of the child requires that the custody should be transferred to the mother.

8. Shri Apte the learned Counsel for the Respondent pointed out that the allegation regarding remarriage is totally false. He submitted that even assuming for the sake of arguments that there is a remarriage, this by itself is not a

ground for disturbing the custody of the child when there is no allegation made by the Appellant that the minor son is not being looked after properly or is being ill-treated. He relied upon the progress card of the child issued by the school showing that his academic performance is excellent. He submitted that the allegations regarding misbehaviour are totally false and no reliance can be placed on the newspaper reports. He submitted that practically from the birth of the child the Respondent is looking after the child and the child has become used to the company of the Respondent. He submitted that at this tender age after lapse of five years if the Court compels the child to stay with mother, the child will be seriously affected. He submitted that the welfare of the child requires that custody shall not be disturbed at this tender age. He submitted that the Respondent is looking after the child properly. He has sufficient funds to look after the child and that his mother is taking care of the child.

9. I have considered the submissions. When the Application was filed by the Appellant the child was two and half years old. However, there was a delay in disposal of the Application. Therefore, the fact remains that the child continued to be in custody of the Respondent for such a long time. I interviewed the child in my chamber. The child is only five and half years old and obviously was in confused state of mind due to the fight between the parents. When I found that the child was not in any position to express any clear opinion, I did not make any further queries to the

child.

10. The alleged remarriage of the Respondent cannot by itself a ground to disturb the custody but it will be a relevant consideration. Similarly, the alleged misconduct of the Respondent in public place after alleged consumption of liquor is also a relevant consideration. If in a given case evidence is produced on record to show that the father of the child is addicted to liquor or is misbehaving after consuming liquor and if such evidence is convincing then the Court may be compelled to disturb the custody of the child if welfare of the minor requires such harsh order to be passed.

11. The marriage invitation card of the marriage of one Santosh which is produced at Exh.57 in the Trial Court. In the long list of invitees a name appears as "Mrs. and Mr.Poonam-Savita Ankush S. Yadav." The Respondent in his cross examination stated that mention of name of Savita against him is incorrect. He admitted that he did not take any steps as regards the said mistake. However, he admitted that the name of Savita was printed against his name. In this Court an Affidavit is filed and reliance is placed on public notice dated 23rd April 2004 published at the instance of Gulab Yadav, the father of the bridegroom Santosh in which it is purportedly stated that an objection was raised to the reference to the name of Savita Ankush Yadav by the Respondent by a letter dated 25th August 2003 and therefore

he was publishing a clarification to that effect. It is stated that the reference to the name of Savita was a printing mistake. Prima facie it appears to me that a public notice dated 23rd April 2004 is an effort made by the Respondent to get over the evidence of the invitation card. However, I am not expressing any final opinion on the said aspect.

12. The newspaper reports regarding the incident of the alleged misbehaviour of the Respondent were on record of the Trial Court at Exh.50 and Exh.51. It appears that attention of the Respondent was invited to the said newspaper reports. He merely stated that the fact of publication of the news item is correct. In this Appeal along with the additional Affidavit copies of statement of the Appellant and one Savita allegedly recorded by the Police are produced. There is indication from the said statements that Savita was residing in the house of the Respondent and she is claiming to be a keep of the Respondent. However the said statements are not proved in the evidence. The Respondent was not confronted with the said statements. Whether the said statements are admissible in evidence or not is obviously is not examined.

The said statements are not produced before the Trial Court as the same are purportedly recorded after disposal of the matter by the Trial Court.

13. If the Respondent has remarried or has kept a keep and

the said fact is suppressed from the Court, the same will have to be considered as one of the relevant circumstance. The alleged conduct of the Respondent of misbehaving in a temple under the influence of the liquor is also a conduct which is required to be considered. If such conduct is established against the Respondent, the overall effect of such conduct on the child will have to be also examined and it will have to be considered whether the welfare of the child lies in continuing the custody of the minor child with the Respondent.

14. The Trial Court has not considered the aforesaid aspects. Though the statements recorded by the Police were not before the Trial Court, the marriage invitation card was exhibited in evidence. The Trial Court has not at all considered the case made out by the Respondent regarding misbehaviour of the Respondent under the influence of the liquor though the said case was specifically made out before the Trial Court. In the Appeal further material is placed on record in the form of a public notice published by father of the said Ankush. In this appeal, the Respondent has also placed reliance on the progress report of the minor child showing his good progress. The said documents, if true, may not be conclusive but nevertheless the cumulative effect of the evidence on record along with the said documents will have to be considered. The Trial Court has simply stated that the Appellant is a handicapped person and she is not in

a position to look after the child and the Respondent is looking after the child since last five and half years practically from the birth of the Respondent. It must be stated that in a given case, merely because the mother is required to use a wheelchair due to physical handicap it cannot be said that the mother is not in a position to look after the child or to take care of the child. In my view the approach of the Trial Court while dealing with the matter was not at all proper. Moreover, the additional material placed on record of the Appeal which needs to be considered if it is proved. Therefore, there is no option but to remand the matter to the Trial Court. 15. The learned Counsel for the Appellant submitted that while passing the order of remand the custody should be handed over to the mother and only if the mother fails in the Application, the child will have to be returned to the Respondent. For the last about five years or more the child is in the custody of the Respondent. The child is staying with the mother at week ends as per the interim order passed by this Court. Considering the tender age of the child and considering the fact that the case is made out for remand of the matter to the Trial Court, it will not be in the interests of the minor child to disturb the custody at this stage. 16. My attention has been invited to the interim orders passed by this Court. As per the interim arrangement during the pendency of this Appeal, on every Friday the child is brought at 5.00 p.m. to the Court of Judicial Magistrate at Pimpri and the child is handed over to

the Appellant in presence of the learned Magistrate and on Monday at 11.00 a.m. the child is again handed over to the Respondent-father in presence of the learned Magistrate. Shri Apte submitted that the said arrangement is causing inconvenience to the child as school of the child does not have holiday on Saturdays. However, it is not disputed that after the child is given in temporary custody of the mother, the child is being regularly taken to the school on Saturday. In my opinion, if the arrangement which is made during the pendency of the Appeal has worked for more than last six months same will have to be continued even after the remand of the matter to the Trial Court. The learned Counsel submitted that the child will have Diwali vacation from 2nd November 2004 to 20th November 2004. Now the child is used to stay with the mother at weekends therefore, it is necessary to grant temporary custody to the mother for sufficiently long time during the Diwali vacation. Though the custody of the child is retained with the father, the child needs company of the mother also. There is nothing adverse against the mother. As the child grows old he will need company of both the parents. It is, therefore, desirable that on 2nd November 2004 the child should be handed over to the mother at 5.00 p.m. in presence of the learned Magistrate, Pimpri and the child will stay with the mother till 11th November 2004. On 11th November 2004 at 11.00 a.m. the child will be brought before the learned Magistrate and will be handed over to the Respondent-father.

The said arrangement is opposed by the learned Counsel for the Respondent. However, it must be noted that for about last six months, from Friday evening to Monday morning the child is staying with the mother and there is no grievance that at week ends the child is not being properly looked after. It is not in dispute that the child has not resisted the said arrangement and is staying with mother at weekends. The welfare of the minor child requires that though the custody is retained for the time being with the Respondent-father, the child should have of the mother's company for a reasonable time. There is no substance in the objection raised by the learned Counsel for the Respondent.

17. In view of this position, I pass the following order :

i) The Appeal is partly allowed. The impugned Judgment and Order is quashed and set aside and Civil Miscellaneous Application No.851 of 2000 is remanded back to the 4th Additional District Judge, Pune. The parties will appear before the Additional District Judge, Pune on 23rd August 2004 at 11.00 a.m. for fixing the schedule of the hearing.

ii) The Appellant is permitted to apply for amendment of the custody application. The Application shall be made within two weeks from 23rd August 2004. The Respondent will be entitled to file Additional written statement/reply if the amendment is allowed to be carried out to the custody

Application.

iii) The learned Additional District Judge will permit both the parties to lead further oral and documentary evidence.

iv) The learned Additional District Judge, Pune will decide the Application as expeditiously as possible after considering the evidence which is already on record and the evidence which will be adduced by the parties after remand. The Application shall be preferably disposed of by 23rd December 2004.

v) Till the disposal of the Application the Respondent will bring the child to the Court of Judicial Magistrate at Pimpri on every Friday at 5.00 p.m. and will hand over the temporary custody of the child in favour of the Appellant-mother in presence of the learned Magistrate. On following Monday at 11.00 a.m. the child will be brought before the learned Magistrate and will be handed over to the Respondent. On 2nd November 2004 the child will be brought to the Court of learned Judicial Magistrate, Pimpri at 11.00 a.m. and temporary custody of the child will be handed over to the Appellant-mother till 11.00 a.m. on 11th November 2004. On 11th November 2004, the child will be brought back before the learned Magistrate and will be handed over to the Respondent. It is made clear that from 12th November 2004 to 15th November 2004 the Appellant will not be entitled to

temporary custody of the minor child. In case of any genuine difficulty in the implementation of this arrangement, the parties are free to apply to the learned Additional District Judge, Pune for necessary modification.

vi) All contentions on merits are kept open.

vii) The parties and the Courts below to act upon an ordinary copy of the order duly authenticated by the Court Sheristedar.

Judge.